

No. 12878

IN THE

**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12878

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S ANSWER AND ARGUMENT TO SPECIFICATION OF ERROR 2

This reply brief will be limited to a brief discussion of appellee's argument in answer to the second specification of error. It is apparent that appellee at least partially has misconstrued appellant's argument with reference to the restriction of the cross examination of Mrs. Elliott by the court. On page 13 of the answering brief, it is stated in substance that the appellant was not prevented from cross examining Mrs. Elliott with regard to past statements or past conduct inconsistent with her testimony in the case of bar and that the court's ruling was that appellant would be bound by her answers. It is the position of appellant that as shown by the court's ruling (R118), which ruling is also quoted on page 13 of appellee's brief, that the court limited the cross examination of Mrs. Elliott to an extremely narrow phase of the inquiry. It will be noted that the court specifically stated that appellant would be permitted to ask Mrs. Elliott if she were not, at some time two or three months prior to her meeting the appellant, in love with some other man. This extremely narrow limitation for all practical purposes was a prejudicial denial of appellant's right of cross examination. So that the matter may be more fully before the court, we herewith set forth appellant's offer of proof as well as the court's ruling:

"Mr. Olson: Your Honor, I think to have the matter

squarely before the court I might first state what we offer to show.

"The Court: Yes. Also I don't think there has ever been any formal offer of the documents that are the main subject of discussion here.

"Mr. Olson: Then I do, your Honor, offer in evidence defendant's identifications 5, 6 and 7, and the defendant offers to prove by the cross examination of Elaine Elliott that shortly prior to meeting Mr. Chamales that she took a trip, while she was married to Wright Elliott, that she took a trip with her brother-in-law, Bobbie Elliott, from Chicago to Tulsa and return through Pine Bluffs, Arkansas, back to Little Rock. We offer to show that in her divorce proceeding—

"The Court: Pardon me; before you leave that subject I wonder if you couldn't make the time element a little more specific? You say shortly before; that might vary over a period of weeks or months, depending on your idea of shortly.

"Mr. Olson: That the trip was taken during September and October of 1948.

"The Court: All right.

"Mr. Olson: That the witness Elaine Elliott in her divorce proceedings, by way of a verified complaint, swore under oath, the custody of her child in the divorce proceedings being at stake, that she swore under oath in her pleadings that that trip was instigated at the suggestion of her husband Wright Elliott for the purpose of indicating adultery with his brother Bobbie Elliott, and that the entire matter was a conspiracy between her then husband Wright Elliott and his brother against her; that throughout the entire trip she had not stayed or slept with Bobbie Elliott in the same bed or cabin, and that the entire relationship was entirely proper between them. I offer to show that in her divorce proceedings she was interrogated under

oath and testified substantially to those facts, that while the trip was taken it was not at her instigation or her request, but solely because her husband and brother-in-law had had a conspiracy against her. We then offer to show by the defendant's identifications 5, 6 and 7, and by the witness' testimony on cross-examination, which we believe she will be forced to admit, that those sworn statements in her complaint, her counter-complaint, as well as the sworn statements made in the divorce proceedings, were false, and that she knew them to be false at the time that (111) she made the statements. We submit that the records which we have referred to, the divorce complaint, or her counter-complaint, which I have not yet, your Honor had identified or offered in evidence but which I now offer or I have here and I'm willing to offer, a photostatic copy of her countersuit, in which she made the allegations that I've referred to, we submit that that, together with the record of the testimony, together with these letters, are admissible for the following purposes:—

“The Court: Pardon me; before you go into that I wonder if it wouldn't make a better record if we have any documents you refer to identified so that they will be available as a part of the record.

(Whereupon, photostatic copy of answer and counter-complaint were marked defendant's Exhibit No. 3 for identification).

“The Court: Now just state briefly what that is.

“Mr. Olson: Your Honor, in the Chicago practice, I'm not entirely familiar with it, but what it is, the one document is labeled an answer to the complaint, and then apparently companion to it is what is labeled a counter-complaint for divorce. We would file an answer and cross-complaint, but one is not complete without the other.

"The Court: It's understood that you've offered or (112) are offering identification 8 also.

"Mr. Olson: Yes, we offer it.

(Argument of counsel).

(Whereupon, two auto court registration cards were marked Defendant's Exhibits No. 9 and 10 for identification).

"Mr. Olson: We also offer in evidence defendant's identification 9, which is a registration at the Sycamore Court at Little Rock, Arkansas, under date of October 19, 1948 during this trip, the registration 'Mr. and Mrs. B. Elliott' and defendant's identification 10, being a guest registration dated September 15, 1948, also during this trip, a registration at the Anchor Court in Laurel, Mississippi, and her record will show that this looks like Bobbie Elliott's, that's the brother-in-law, signature.

(Argument of Counsel).

"The Court: For the present, at any rate, I'll deny the offer of defendant's identifications 5 and 10, and the record may show an exception for the defendant. Mr. Freeman, Mrs. Elliott will be available here throughout the trial, I presume?

"Mr. Freeman: If it's so ordered, yes, your Honor.

"The Court: Well, I think she should be kept until the conclusion of the government's case. What I have in (113) mind, I have my law clerk checking up for me on this question of the admissibility of the proffered evidence, and if I should conclude that my ruling hasn't been correct I would like to be in a position to have Mrs. Elliott recalled and the defense given an opportunity to cross-examine her further. At the present time, however, the ruling will be that the offers are

rejected. I think, Mr. Olson, that you should be permitted to cross-examine her with reference to any inconsistent statements, or statements inconsistent with her present testimony, or past conduct inconsistent with her present testimony, and specifically I think you may be permitted to ask her if she didn't testify that the injury she received, or I mean testify in a prior case, in her divorce action, that the injury she received was received from her former husband rather than from this defendant, and also I think you should be permitted to ask her if she weren't at some time only a short time or two or three months prior to meeting the defendant, in love with some other man, and inquire on that line, although I think you'd be bound by her answer, and at the present time at any rate I'm not going to permit you to then attempt to contradict whatever she may say by putting in these documents. Do you get what I have in mind?

"Mr. Olson: Yes, I do, your Honor. (114).

"The Court: All right, you may call in the jury, then."

As can readily be seen from the examination of the record as above set forth, appellant not only offered the identifications but he also offered to prove by cross-examination of Mrs. Elliott that she committed perjury in her divorce proceedings with reference to her conduct with her then brother-in-law, Bobbie Elliott. Certainly, appellant should have been allowed to ask the necessary background questions to permit the appellant to question the witness specifically as to whether her sworn testimony in the divorce proceeding was actually true. The jury was certainly entitled to have before them the facts bearing upon the character and credibility of the witness and to place the witness in her proper setting. Without this back-

ground of a reasonable cross-examination, the jury could not fairly appraise the weight of her testimony. *Tla-Koo-Yel-Lee v. U. S.*, 42 L. Ed. 166, 167 U. S. 274. *Alford vs. U. S.*, 75 L. Ed. 624, 282 U. S. 687.

We cannot overemphasize the fact that a denial of a cross-examination upon the points covered in appellant's offer of proof in effect, amounted to a rejection of appellant's right to question the credibility and the reliability of the witness that was seeking to convict him of this crime.

It is submitted that regardless of the question concerning the admissability of the proffered documents, the right to a reasonable cross-examination should in any event have been recognized.

Respectfully submitted,

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